Supreme Court U.S.
FILED
APR 17 2002
OFFICE OF THE CLERK

(3)

No. 01-1290

IN THE

Supreme Court of the United States

SAM MCINNIS AND TIM SHINGLETON,
Petitioners,

v.

PAMELA ALICE LITTLE DANIEL, AS ADMINISTRATRIX OF THE ESTATE OF JOE ED DANIEL,
Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

REPLY BRIEF FOR PETITIONERS

THOMAS G. HUNGAR
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

ROBERT H. BORK
Counsel of Record
1150 17th Street, N.W.
Washington, D.C. 20036
(202) 862-5851

EDWARD C. GREENE
FRAZER, GREENE, UPCHURCH & BAKER, L.L.C.
P.O. Box 1686
Mobile, Alabama 36633
(251) 431-6020

MARK A. ASH
KIRK G. WARNER
SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN L.L.P.
2500 First Union Capitol Center
Raleigh, North Carolina 27602
(919) 821-1220

Counsel for Petitioners

15pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. RESPONDENT'S JURISDICTIONAL AND "PRUDENTIAL" ARGUMENTS ARE WITHOUT MERIT 1

II. THE QUESTIONS PRESENTED MERIT PLENARY REVIEW 6

CONCLUSION 10

TABLE OF AUTHORITIES

CASES **Page(s)**

Alabama ex rel. Gaston v. Cunninghame, 113 So. 309 (Ala. 1927) 2

Asahi Metal Indus. Co., Ltd. v. Superior Court, 480 U.S. 102 (1987) 6

Bandini Petroleum Co. v. Superior Court, 284 U.S. 8 (1931) 2,3

Board of Educ. v. Superior Court, 448 U.S. 1343 (1980) 2,4

Burger King v. Rudzewicz, 471 U.S. 462 (1985) 8,9,10

Burnham v. Superior Court, 495 U.S. 604 (1990) 6

Calder v. Jones, 465 U.S. 783 (1984) 8,9

Dahlberg v. Fisse, 40 S.W.2d 606 (Mo. 1931) 4

Detroit & Mackinac Ry. Co. v. Michigan R.R. Comm'n, 240 U.S. 564 (1916) 2,3,5

Ex parte Stone, 502 So. 2d 683 (Ala. 1987) 2

Felch v. Transportes Lar-Mex SA DE CV, 92 F.3d 320 (5th Cir. 1996) 10

Fisher v. District Court, 424 U.S. 382 (1976) 2,5

Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984) 8

Largent v. Texas, 318 U.S. 418 (1943) 2,5

Lawson v. Swift, 191 So. 2d 379 (Ala. 1966) 2

Madruga v. Superior Court, 346 U.S. 556 (1954) 2

Michigan Cent. R.R. Co. v. Mix, 278 U.S. 492 (1929) 2,4,5,6

Missouri ex rel. St. Louis, B. & M. Ry. Co. v. Taylor, 266 U.S. 200 (1924).....2,3,5,6

Mt. Vernon-Woodbury Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30 (1916).....2,3

Omeluk v. Langsten Slip & Batbyggeri A/S, 52 F.3d 267 (9th Cir. 1995).....10

Rescue Army v. Municipal Court, 331 U.S. 549 (1947).....5,6

Weston v. City Council of Charleston, 27 U.S. (2 Pet.) 449 (1829).....2,4,5

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).....6

STATUTES

28 U.S.C. § 1257.....4

28 U.S.C. § 1257(a).....1,2

OTHER AUTHORITIES

R. Stern, *et al.*, SUPREME COURT PRACTICE (7th ed. 1993).....2

REPLY BRIEF FOR PETITIONERS

All but conceding that the questions presented in the petition are worthy of this Court's review, respondent devotes the bulk of her brief in opposition to a strained attempt to manufacture procedural objections to a grant of certiorari. Respondent makes no effort to dispute the existence of the multiple conflicts implicated by the decision below, and for good reason. The petition amply demonstrates the widespread divisions of authority over the questions presented and the substantial and recurring importance of the issues raised in this case. Respondent's half-hearted efforts to defend the judgment below and to conceal the significance of the Supreme Court of Alabama's holdings are wholly unpersuasive, and provide no justification for a denial of certiorari.

As demonstrated below, respondent's jurisdictional and "prudential" objections are without merit. An unbroken line of this Court's precedents clearly establishes the principle that decisions by a state's highest court granting or denying an original application for an extraordinary writ constitute "final judgments" for purposes of this Court's jurisdiction. The Supreme Court of Alabama's decision falls squarely into that category. Moreover, the decision below categorically announces rules of law to govern personal jurisdiction inquiries in the Alabama courts, and accordingly there are no prudential objections to this Court's review.

I. Respondent's Jurisdictional And "Prudential" Arguments Are Without Merit

Respondent's principal objection to a grant of certiorari is her claim that the judgment below is "interlocutory" and, accordingly, that this Court lacks jurisdiction under 28 U.S.C. § 1257(a). Respondent's argument is foreclosed by this Court's precedents.

The jurisdiction of the Supreme Court of Alabama below was invoked by the filing of an original petition for a writ of mandamus, not by way of interlocutory appeal. Pet. App. 1a, 2a. Under Alabama law, a mandamus proceeding of this type

is a distinct and separate case in its own right: "'With us mandamus is a civil proceeding or remedy, commenced by petition, and the petition constitutes the first pleading in the case.'" *Lawson v. Swift*, 191 So. 2d 379, 382 (Ala. 1966) (quoting *Alabama ex rel. Gaston v. Cunninghame*, 113 So. 309, 312 (Ala. 1927)). A petition for a writ of mandamus seeking to correct a trial court's error is not the functional equivalent of an interlocutory appeal; the writ of mandamus is instead an "'extraordinary remedy'" that "can not be used as a substitute for appeal." *Ex parte Stone*, 502 So. 2d 683, 685 (Ala. 1987) (citations omitted).

In these circumstances, this Court has repeatedly and consistently held that a state supreme court's disposition of an application for an extraordinary writ such as mandamus constitutes a "final judgment" within the meaning of 28 U.S.C. § 1257(a), regardless of whether further proceedings remain to be conducted in the underlying dispute between the parties. As this Court explained in *Detroit & Mackinac Railway Co. v. Michigan Railroad Commission*, 240 U.S. 564, 571 (1916), "it is settled that a proceeding in mandamus is an independent adversary suit, and a judgment awarding or refusing the writ is a final judgment within the meaning of the statute." The cases stating and reaffirming this well-established principle are legion.[1]

---

[1] *See, e.g., Fisher v. District Court*, 424 U.S. 382, 385 n.7 (1976); *Madruga v. Superior Court*, 346 U.S. 556, 557 n.1 (1954); *Largent v. Texas*, 318 U.S. 418, 421-22 (1943); *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 14 (1931); *Michigan Cent. R.R. Co. v. Mix*, 278 U.S. 492, 494 (1929); *Missouri ex rel. St. Louis, B. & M. Ry. Co. v. Taylor*, 266 U.S. 200, 206 (1924); *Mt. Vernon-Woodbury Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 31 (1916); *Weston v. City Council of Charleston*, 27 U.S. (2 Pet.) 449, 464-65 (1829); *accord Board of Educ. v. Superior Court*, 448 U.S. 1343, 1346 (1980) (Rehnquist, J., in chambers); *see generally* R. Stern, *et al.*, SUPREME COURT PRACTICE 108 (7th ed. 1993).

Respondent nonetheless attempts to avoid the plain import of these cases, asserting that this well-established finality principle is applicable only if the state court's resolution of the original writ proceeding also had the effect of finally resolving a disputed issue *in the separate underlying action*. Opp. 10-13. Respondent is unable to point to a single case that announces or even suggests any such exception to the finality of original writ determinations, because no such exception exists.

Indeed, respondent's argument is squarely foreclosed by the rationale of the cases cited above. Simply put, the justification for treating original writ decisions as final has nothing to do with the perceived impact of those decisions on the separate underlying lawsuit between the parties. Rather, the dispositive point is that an original writ proceeding is a *separate and distinct case*, and thus a state supreme court decision granting or denying such a writ is final *without regard to* the effect of that decision on the separate ongoing litigation between the parties. This Court's cases repeatedly express this unambiguous rationale for their jurisdictional holdings, and that rationale compels a finding of jurisdiction here. *See, e.g.*, *Bandini Petroleum*, 284 U.S. at 14 ("[t]he proceeding for a writ of prohibition is a distinct suit, and the judgment finally disposing of it is a final judgment"); *Missouri ex rel. St. Louis, B. & M. Ry. Co. v. Taylor*, 266 U.S. at 206 ("The application for a writ of prohibition is an independent adversary suit which was finally determined by the judgment under review."); *Detroit & Mackinac Ry. Co.*, 240 U.S. at 571 ("it is settled that a proceeding in mandamus is an independent adversary suit, and a judgment awarding or refusing the writ is a final judgment within the meaning of the statute"); *Mt. Vernon-Woodbury*, 240 U.S. at 31 ("Prohibition is a distinct suit and the judgment finally disposing of it is a final judgment .... The fact that it does not decide the merits of the principal suit is immaterial.").

Indeed, the argument advanced by respondents was expressly rejected by no less an authority than Chief Justice Marshall in his opinion for the Court in *Weston v. City Coun-*

cil of Charleston, 27 U.S. (2 Pet.) 449 (1829). In that case, the Court made clear that the denial of an extraordinary writ is a "final judgment" regardless of whether it finally resolves the parties' dispute over the right in question:

> If [the term 'final judgment'] were applicable to those judgments and decrees only in which the right was finally decided . . ., the provisions of [the jurisdictional statute] would be confined within much narrower limits than the words import, or than congress could have intended. . . . The word "final" must be understood in the section under consideration, as applying to all judgments and decrees which determine the particular cause.

Id. at 464-65.

Subsequent decisions confirm this long-established understanding that a state supreme court's denial of an original writ is a "final judgment" notwithstanding the possibility that the parties could still litigate the same or related issues in a separate proceeding. In *Michigan Central Railroad Co. v. Mix*, 278 U.S. 492 (1929), for example, the petitioner claimed that a Missouri trial court lacked jurisdiction over it, and accordingly sought a writ of prohibition in the Missouri Supreme Court to prevent the trial court from proceeding with the underlying lawsuit. The writ "was denied without an opinion." *Id.* at 494. Under Missouri law, that denial had no res judicata effect. *Dahlberg v. Fisse*, 40 S.W.2d 606, 611 (Mo. 1931). Nonetheless, this Court held that "[t]hat judgment is final within the meaning of" the predecessor to 28 U.S.C. § 1257. 278 U.S. at 494.

More recently, in *Board of Education v. Superior Court*, 448 U.S. 1343 (1980) (Rehnquist, J., in chambers), then-Justice Rehnquist concluded that this Court would have jurisdiction to review the Supreme Court of California's denial of an application for a writ of mandamus and/or prohibition, even though that denial was without opinion and the questions at issue were still pending before the intermediate appellate court in the underlying case. *Id.* at 1344-45, 1347-48.

Relying on *Fisher v. District Court*, 424 U.S. at 385 n.7, Justice Rehnquist concluded that the "petition for a writ of mandamus and/or prohibition was a distinct lawsuit which was fully and finally determined by the California Supreme Court's judgment," and thus he was "persuaded that this Court would in all probability have jurisdiction over the present action." 448 U.S. at 1346.[2]

Thus, respondent is simply wrong in contending that the possibility of further litigation regarding personal jurisdiction in the state trial court proceeding renders the judgment below non-final. The Supreme Court of Alabama denied petitioners' original writ application in a published opinion that has precedential effect and that finally resolved the mandamus proceeding before the court. That judgment is unquestionably final under this Court's decisions.[3]

Respondent's "prudential" objections to a grant of certiorari are equally wide of the mark. The only case that respondent cites in support of this argument is *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947), but that case is inapposite, as the reasons for declining jurisdiction there (namely, the complexities and lack of clarity in the regulatory scheme

---

[2] *Accord, e.g., Largent v. Texas*, 318 U.S. at 421-22 ("The proceeding in the county court was a distinct suit. . . . The possibility that the appellant might obtain release by a subsequent and distinct proceeding . . . in the same or a different court of the State does not affect the finality of the existing judgment."); *see also Detroit & Mackinac Ry. Co.*, 240 U.S. at 571 ("as this court has said, 'all judgments and decrees which determine the particular cause' are final in the sense of the statute. . . . This view has prevailed through a century of practices in reviewing judgments and decrees dismissing causes . . . for . . . reasons not decisive of the merits.") (quoting *Weston*, 27 U.S. (2 Pet.) at 463-65).

[3] Respondent's suggestion (Opp. 13) that the finality of original writ decisions extends only to cases involving subject matter jurisdiction is, of course, patently incorrect. *See, e.g., Taylor*, 266 U.S. at 206 (denial of original writ petition challenging personal jurisdiction constitutes final judgment); *Mix*, 278 U.S. at 494 (same).

at issue and the ambiguities in the state court's construction thereof, *id.* at 551-52, 574-85) have no parallel here.

As even respondent reluctantly acknowledges (Opp. 15, 16-17 & n.7), moreover, this Court has frequently granted certiorari to review questions of personal jurisdiction addressed in pre-trial rulings by state high courts. *E.g.*, *Burnham v. Superior Court*, 495 U.S. 604, 608 (1990); *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 108 (1987); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 289-90 (1980); *Mix*, 278 U.S. at 494; *Taylor*, 266 U.S. at 206. Precisely the same considerations that justified the Court's exercise of jurisdiction in those cases are present here: The court below decided questions of federal constitutional law in a manner that dramatically expands the scope of state court jurisdiction and conflicts with decisions of numerous other courts. No "prudential" considerations militate against review here.

II. The Questions Presented Merit Plenary Review

1. The petition demonstrates the existence of a widespread division of authority over the degree of "relatedness" between a defendant's forum contacts and the plaintiff's cause of action that must be shown in order to establish specific personal jurisdiction. Pet. 11-16. Moreover, the petition shows that the decision below further exacerbates this preexisting conflict, because the court below virtually dispensed with the relatedness requirement altogether. Pet. 16-18.

Respondent makes no effort to dispute these points. Indeed, she does not (and cannot) contest petitioners' showing that the result below would necessarily have been different had the Supreme Court of Alabama adopted either the "proximate cause" test employed by the First Circuit and other courts or the Ninth Circuit's "but for" test. Pet. 17-18.

Nonetheless, respondent contends that "there is no need for this Court to engage in academic, abstract rumination about potential tests for 'arising out of' or 'related to.'" Opp. 23. But as the detailed and unrebutted discussion in the peti-

tion makes clear, those questions are far from "academic" or "abstract" in the context of this case. To the contrary, on this record the selection of the correct "relatedness" test would be dispositive of the personal jurisdiction issue. Accordingly, this case provides a perfect vehicle for resolving the wide conflict among the state and federal authorities over a question that arises with considerable frequency and that this Court has previously noted but not yet had an opportunity to resolve. *See* Pet. 9-11, 28-29. For this reason alone, review is clearly warranted.

2. Respondent offers no direct response to petitioners' showing (Pet. 18-24) that the Supreme Court of Alabama's decision to attribute to petitioners the "stream of commerce" activities of the corporate defendants conflicts with the decisions of numerous other courts. In an attempt to demonstrate the correctness of the judgment below, however, she seems to suggest that no such attribution occurred or, in the alternative, that this Court's precedents authorize attribution for personal jurisdiction purposes. Neither suggestion is correct.

Respondent first asserts that petitioners, "as directors of sales and later as owners and directors of the entire corporation, . . . purposefully marketed and sold in Alabama a dangerous . . . product," Opp. 8, and implies that jurisdiction in Alabama is therefore appropriate without regard to attribution principles. But as the amended complaint and respondent's own brief make clear, there is no allegation or evidence that petitioners *personally* engaged in each step of the manufacturing, marketing, and distribution process, and there is certainly no allegation or evidence that petitioners were *personally* involved in the production or sale of the particular unit or units of Fix-a-Flat that allegedly caused the injury at issue in this case. To the contrary, as even respondent ultimately admits, it was "Snap Products, Inc., and then Snap Automotive Products, Inc., [that] manufactured and sold an aerosol tire inflator product ('fix a flat') throughout the United States, including the State of Alabama." Opp. 5. Respondent's artful attempts to distort the record cannot hide the fact that the Supreme Court of Alabama's holding clearly

rests on the assumption that the manufacturing, distribution, and sales activities of the *corporate defendants* were attributable to petitioners—a holding that is squarely in conflict with the numerous decisions cited in the petition. *See* Pet. 18-19.

Respondent alternatively attempts to justify the use of attribution here, pointing to this Court's observation that "when commercial activities are 'carried on in behalf of' an out-of-state party those activities may sometimes be ascribed to the party . . . ." Opp. 26 (quoting *Burger King v. Rudzewicz*, 471 U.S. 462, 480 (1985). But absent piercing of the corporate veil (which is not at issue in this case), corporations do not carry on activities "in behalf of" their shareholders or officers—that is precisely the point of the cases cited in the petition that reject attribution in these very circumstances. Pet. 19-25. Respondent's attempt to take this isolated passage out of context cannot conceal the conflict between the decision below and the numerous cases cited by petitioners.

Indeed, if respondent's reference (Opp. 26, 29) to the discussion of attribution principles in *Burger King* and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), has any significance at all, it is only to confirm the need for this Court's review. In *Burger King* this Court expressly declined to "resolve the permissible bounds of such attribution." 471 U.S. at 480 n.22. Similarly, in *Keeton* the Court did not reach the question whether the corporate defendant's principal shareholder and officer was subject to personal jurisdiction together with the corporation. 465 U.S. at 781 n.13. Having previously recognized the unresolved nature of this question, this Court should take the opportunity afforded by this case to bring clarity to this area of the law and eliminate the conflict among the authorities engendered by the decision below.

In a last-ditch effort to defend the judgment below, respondent argues that the Alabama courts' assertion of personal jurisdiction can be justified by the "effects" test of *Calder v. Jones*, 465 U.S. 783 (1984). In the first place, of course, the court below did not rely on that theory, and thus

respondent's argument does nothing to underm. e the need for plenary review here. In any event, *Calder* did not authorize the attribution of corporate conduct to individual corporate shareholders or officers. To the contrary, *Calder* expressly held that the individual defendants' "contacts with California are not to be judged according to their employer's activities there." *Id.* at 790. The crucial fact in *Calder*—and one that is entirely absent here—is that the individual defendants in that case were "not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California," in that they wrote and edited an article "that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in" California. *Id.* at 789-90. Having "knowingly cause[d] the injury in California" through conduct "intentionally directed at a California resident" and "calculated to cause injury to [her]," the *Calder* defendants could not be heard to complain about the assertion of jurisdiction over them in California. *Id.* at 790, 791.

In this case, by contrast, there is no allegation or evidence that petitioners "knew" that respondent's decedent (or anyone else in Alabama) would suffer injury, let alone that petitioners intentionally engaged in conduct "calculated to cause injury to" decedent. *Calder*'s "effects" test has no application here, and provides no basis for denying review.

3. Respondent attempts to defend the Supreme Court of Alabama's erroneous reliance on "reprehensibility" as establishing minimum contacts (Opp. 25), but her argument serves only to confirm the need for this Court's review. Respondent relies on this Court's observation that the "reasonableness" of an assertion of jurisdiction may sometimes be established "upon a lesser showing of minimum contacts than would otherwise be required." *Burger King*, 471 U.S. at 477. But respondent overlooks the qualifying statement that directly precedes this language: "*Once it has been decided that a defendant purposefully established minimum contacts within the forum State*, these contacts may be considered in light of

other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." *Id.* at 476 (citation omitted; emphasis added). Thus, the statement quoted by respondent does not stand for the proposition that factors such as "a State's interest in adjudicating the dispute" can make up for what would otherwise be the absence of minimum contacts. To the contrary, *Burger King* indicates that such factors are relevant only in determining whether "fair play and substantial justice" permit the assertion of jurisdiction—an inquiry that occurs only *after* the required showing of constitutionally sufficient minimum contacts has first been made.

In any event, even if there were some doubt about the proper interpretation of *Burger King* on this point, review would still be warranted. As explained in the petition (without contradiction from respondent), numerous courts of appeals have held that the *Burger King* "reasonableness" factors cannot be used to supplement an otherwise deficient showing of minimum contacts; those factors are instead wholly irrelevant unless and until the requisite minimum contacts have first been established. *See, e.g., Felch v. Transportes Lar-Mex SA DE CV*, 92 F.3d 320, 329 (5th Cir. 1996) ("[a]s [plaintiff] failed to establish sufficient 'minimum contacts' with Texas, we need not address whether the exercise of personal jurisdiction in this case would offend traditional notions of fair play and substantial justice"); *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 270-71 (9th Cir. 1995) ("[w]e do not discuss the 'reasonableness' criterion, because . . . it is plain that the first two criteria are not satisfied"); *see generally* Pet. 25-26 & n.11. Thus, respondent's reliance on her misguided interpretation of *Burger King* merely confirms the need for this Court's review to resolve the conflict created by the Supreme Court of Alabama's bizarre "reprehensibility" holding.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THOMAS G. HUNGAR
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

ROBERT H. BORK
Counsel of Record
1150 17th Street, N.W.
Washington, D.C. 20036
(202) 862-5851

EDWARD C. GREENE
FRAZER, GREENE, UPCHURCH & BAKER, L.L.C.
P.O. Box 1686
Mobile, Alabama 36633
(251) 431-6020

MARK A. ASH
KIRK G. WARNER
SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN L.L.P.
2500 First Union Capitol Center
Raleigh, North Carolina 27602
(919) 821-1220

Counsel for Petitioners

April 17, 2002